

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PHIL FLEENER,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCEB No. 89-110

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter concerns Phil Fleener's appeal of the State of Washington Department of Ecology's penalty (No. DE 89-E197; \$5,000) for timber harvesting along the Palouse River in Whitman County, in alleged violation of Chapt. 173-202 WAC.

The hearing on the merits was held on April 23, 1990 in Walla Walla, Washington. Chair Judith Bendor was present for the Pollution Control Hearings Board. Appellant Phil Fleener represented himself. Respondent DOE was represented by Assistant Attorney General Douglas Mosich. Suzan R. Wells of Bridges and Kennedy reported the proceedings.

1 At the hearing witnesses were sworn and testified. Exhibits were
2 admitted and examined. Argument was made. Members Wick Dufford and
3 Harold S. Zimmerman have reviewed the record. From the foregoing, the
4 Board makes the following:

5 FINDINGS OF FACT

6 I

7 Mr. Fleener is a resident of Moscow, Idaho. He provides logging
8 services to Washington State property owners. In the spring of 1988,
9 with the assistance of Washington State Department of Natural
10 Resources personnel ("DNR"), he prepared a permit application
11 (No. 01-3676) to cut a stand of ponderosa pine on 10 acres of private
12 land along the Palouse River, in Whitman County, within Section 31, T.
13 17 N., R. 44 E.W.M. The property is owned by Mr. Roy McDonald of
14 Colfax, Washington. The application was circulated to various
15 agencies for comment.

16 In May 1988 DNR issued a Forest Practices permit ("permit"; No.
17 FP 01-3676) with conditions:

- 18 1. No trees shall be cut within 50' of the
19 Palouse River.
- 20 2. Only 30% of the merchantable trees within
21 200 feet of the Palouse River may be
22 removed.
- 23 3. Hauling shall be subject to the
24 restrictions contained in a hydraulic
25 permit.
- 26 4. No equipment shall be operated within 50'
27 of the Palouse River.

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- 1
2 5. Contact the DNR Southeast Regional Office
3 five days prior to completion of
4 operations for a closeout check.

5 Fully a year before the permit's issuance, DNR personnel had met
6 with Fleener on-site to go over the proposed logging activities. At
7 that time the DNR employee expressed a question on how Fleener was
8 going to access the trees for harvest.

9 III

10 Between July and October, 1988, Fleener clearcut almost all the
11 trees within 200 feet of the river, including all the trees within 50
12 feet. He cut trees with large root systems that had been embedded in
13 the riverbank.

14 The stand of trees was a mature growth of ponderosa pine, 50 to
15 150 years in age. The trees ranged in size from 10 to 45 inches in
16 diameter. Such a mature stand is rare for this area of the Palouse
17 River. It is not known whether the trees will return after this
18 logging.

19 A DNR inspection on October 17, 1988 revealed that Fleener had
20 crossed the river with an 18-wheel logging truck and a cable loader on
21 tracks. He had never obtained a hydraulics permit to cross the river
22 and knew he should not have made the crossing with this equipment.

23 It will take at least 25 years for the riverbank to stabilize
24 after this logging.

25 The damage caused to this area is clearly long-term.

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IV

Mr. Fleener logged 23,500 board feet of timber. His profit from the job, after paying his employee, was \$40 per 1,000 board feet, or \$940 dollars.

He left a pile of slash after he finished the logging. This slash was left in the 50 year floodplain of the river.

V

Appellant's reasons for undertaking this logging in contravention of the permit conditions were that the State forest practices procedures were too slow, that he had an obligation to the landowner to maximize and manage his timber, that based on his own experience cutting only one-third of the trees would create the likelihood of a windfall ~~occurring~~, and that old growth constituted a fire potential.

He made no effort to have the conditions of his permit modified or to otherwise further consult with state personnel prior to undertaking his actions.

We find that Fleener has not proven his statements regarding windfall and fire hazard.

VI

On July 25, 1989 the Department of Ecology ("DOE") issued Notice of Penalty Incurred and Due (No. DE 89-E197; \$5,000) alleging that Fleener had violated the law, citing RCW 90.48.420; Chaps. 173-201, -202; 222-30 WAC. Fleener appealed this penalty, which became our PCHB No. 89-110.

FINAL FINDINGS OF FACT,
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VII

Any Conclusion of Law deemed to be a Finding of Fact is adopted as such.

From these Findings of Fact, the Board comes to these:

CONCLUSIONS OF LAW

I

The Forest Practices Act at RCW 76.09.040 authorized the adoption of regulations for forest practices. Those regulations pertaining to water quality were to be adopted individually by the Forest Practices Board and the Department of Ecology after agreement. RCW 90.48.430.

The Forest Practices Board adopted forest regulations at Chpts. 222-08 through 222-50 WAC. DOE has adopted by reference select portions of the regulations, including portions of Chapt. 222-30 WAC on Timber Harvesting. (See WAC 173-202-020 for the complete list of DOE adopted regulations. Hereafter, all references to Chapter 222-30 WAC are only to provisions DOE has adopted.)

II

Chapt. 222-30-WAC governs the removal of timber from forest lands in commercial operations, and the post-harvest cleanup. The purpose of these rules is prophylactic, to prevent harm to the environment. To prove liability the Department need only prove violation of the regulations. They need not prove actual harm.

III

WAC 222-30-020(4) covers riparian management zones, which are

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1 areas from the ordinary high-water mark inland to upland plant
2 communities. The maximum width for a riparian zone for Type 1 Water
3 is 100 feet. The Palouse is a Type 1 Water under state regulations.

4 In such zone the regulation requires, in part, that fifty percent
5 or more of the trees shall be left live and undamaged on completion of
6 the harvest. WAC 222-30-020(4)(c). Appellant was given ample warning
7 of this requirement in the permit. He violated this regulation.

8 This is a serious violation. The trees had grown all the way down
9 to the river, providing shade for the waters. The summers are hot in
10 this part of the State, and unshaded water courses heat up more than
11 ones lined by trees. Changes in water temperature can adversely
12 affect aquatic life.

13 IV

14 WAC 222-30-030(4) requires that trees that display large root
15 systems embedded in the bank not be harvested. Had appellant observed
16 the permit condition of no harvest within 50 feet of the river, he
17 would not have violated the regulation on embedded trees.

18 This, too, is a serious violation. Tree roots help to stabilize
19 riverbanks. When trees are cut, their roots die, leaving little to
20 hold the soil in the bank. Loss of this protection increases soil
21 loss, sending silt into the river, with the potential to harm aquatic
22 life.

23 V

24 Any use of tractors, wheeled skidders, or other yarding equipment
25

1 within the riparian managment zone is allowed only as described in an
2 approved forest practices application or otherwise approved in
3 writing. WAC 222-30-070(2)(a). No such approval was given.
4 Appellant violated this regulation when he used his equipment to log
5 right up to the river. This is a significant violation. Heavy
6 equipment can significantly disrupt the riparian zone.

7 V

8 Slash is not to be left piled within the 50 year-flood level of
9 the river unless burning will be completed before the next ordinary
10 high-water season. WAC 222-30-100(1)(c). The purpose of this
11 regulation is to prevent debris from entering the water body. Such
12 debris can harm aquatic life.

13 Mr. Fleener left some slash in this area. Burning was not done
14 within the required timeframe. This regulation has been violated.

15 VI

16 The purpose of civil penalties is to promote compliance. Mr.
17 Fleener took his actions despite the clear warnings provided by the
18 permit and the Department's advice. He has caused long-term damage.

19 The penalty is justified.

20 VII

21 Any Finding of Fact deemed to be a Conclusion of Law is hereby
22 adopted as such.

23 From these Conclusions of Law the Board enters this:

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25
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(7)

ORDER

Notice of Penalty Incurred and Due No. DE 89-E197 (\$5,000) is
AFFIRMED.

DONE this 6th day of June 1990.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member

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